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IS PALESTINE A "STATE"? A RESPONSE TO PROFESSOR JOHN QUIGLEY'S ARTICLE, "THE PALESTINE DECLARATION TO THE INTERNATIONAL CRIMINAL COURT: THE STATEHOOD ISSUE"

Robert Weston Ash*

INTRODUCTION

On December 19, 2008, the six-month ceasefire mediated by Egypt between Israel and leaders of Hamas in the Gaza Strip expired.[1] Shortly thereafter, Hamas and other Palestinian groups resumed indiscriminate rocket and mortar attacks from the Gaza Strip against Israeli settlements and territory.[2] In response, Israel launched Operation "Cast Lead," a military incursion into the Gaza Strip, which lasted approximately three weeks.[3] In the wake of Cast Lead, the Palestine Authority (PA) lodged a declaration (Declaration) with the Registrar of the International Criminal Court (ICC) accepting ICC jurisdiction in the "territory of Palestine," retroactive to July 1, 2002.[4] The PA cited

* Assistant Professor of Law, Regent University School of Law, Virginia Beach, Virginia. B.S., United States Military Academy; M.I.P.P., Paul H. Nitze School of Advanced International Studies (SAIS), Johns Hopkins University; J.D., Regent University School of Law. Also serves as Senior Litigation Counsel for National Security Law at The American Center for Law and Justice (ACLJ), a national public interest law firm, headquartered in Virginia Beach, Virginia. I especially appreciate the insightful comments by my Regent colleague, Craig Stern, as well as support provided by Ben Eastburn, Travis Weber, and Aaron Mullen.

[1] *TIMELINE: Israel-Hamas Violence Since Ceasfire Ended*, REUTERS, Jan. 13, 2009, http://www.reuters.com/article/topNews/idUSTRE50B6CL20090113.

[2] *Id.*

[3] DAVID MAKOVSKY, THE WASH. INST. FOR NEAR E. POL'Y, POLICYWATCH NO. 1462, PRELIMINARY ASSESSMENT OF ISRAEL'S OPERATION CAST LEAD (2009), http://www.washingtoninstitute.org/templateC05.php?CID=2997.

[4] Ali Khashan, Minister of Justice, Palestinian Nat'l Auth., Declaration Recognizing the Jurisdiction of the International Criminal Court (Jan. 21, 2009), *available at* http://www2.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration 2.pdf.

Article 12(3) of the ICC Statute as the legal basis for its Declaration.[5] Article 12(3) reads as follows: "If the acceptance of a *State* which is not a Party to this Statute is required under paragraph 2, that *State* may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question . . . ."[6]

As Professor John Quigley correctly noted in his article, "The Palestine Declaration to the International Criminal Court: The Statehood Issue,"[7] the ICC will have jurisdiction pursuant to Article 12(3) *only if* "Palestine qualifies as a 'state,' since only a *state* that is *sovereign* in a particular territory can confer jurisdiction on the ICC in that territory."[8] Having stated the ICC Statute's requirement correctly, Professor Quigley then set out to show that Palestine, in fact, meets the requirements under international law to be a "State."

Professor Quigley raised five basic arguments to demonstrate that Palestine qualifies as a "State" under international law. His arguments can generally be summarized as follows: (1) that Palestine had officially declared its statehood in 1988;[9] (2) that the UN, responding to that declaration of statehood, regards Palestine as a "State;"[10] (3) that many states have recognized Palestine as a "State;"[11] (4) that there are no competing claimants to the Gaza Strip and the West Bank;[12] and (5) that sovereignty devolved upon the Palestinian people when the British Mandate ended, thereby establishing a "continual statehood" for the Palestinians.[13]

This Response will show that Professor Quigley's case for Palestinian statehood is not as clear-cut and convincing as he apparently believes. First and foremost, Professor Quigley utterly failed to consider a long series of official statements (including very recent ones) by top Palestinian officials openly and repeatedly disclaiming that Palestine is currently a "State." Additionally, he seriously overstated or misinterpreted much of the other evidence he cited. This Response will argue, contrary to Professor Quigley's conclusion, that readily available evidence overwhelmingly establishes that "Palestine" is not currently a "State"—and never has been one. As such, the PA Declaration lodged with the ICC Registrar is of no legal effect whatsoever and cannot convey jurisdiction over any territory or persons to the International Criminal Court.

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[5] *Id.* Note that Article 11 of the Rome Statute limits ICC jurisdiction to *States* that become Parties after the Rome Statute came into force (i.e., July 1, 2002) to those crimes committed *after* entry of the new State Party, "unless that *State* has made a declaration under article 12, paragraph 3." Rome Statute of the Int'l Criminal Court, Conference of Plenipotentiaries on the Establishment of an Int'l Criminal Court, art. 11(2), U.N. Doc. A/CONF.183/9 (17 July 1998) [hereinafter "Statute" or "Rome Statute"] (emphasis added), *reprinted in* 37 I.L.M. 998 (1998), *available at* http://www2.ohchr.org/english/law/criminalcourt.htm.

[6] Rome Statute art. 12(3) (emphasis added).

[7] John Quigley, *The Palestine Declaration to the International Criminal Court: The Statehood Issue*, 35 RUTGERS L. REC. 1 (2009), http://www.lawrecord.com/files/35-rutgers-l-rec-1.pdf.

[8] *Id.* at 3 (emphasis added) (citing Rome Statute art. 12(3)).

[9] *Id.* at 4 (citing Palestine National Council: Political Communique and Declaration of Independence, Nov. 15, 1988, U.N. Doc. A/43/827, S/20278, Annex III, Nov. 18, 1988, *reprinted in* 27 I.L.M. 1668 (1988)).

[10] *Id.* at 4–5 (citations omitted).

[11] *Id.* at 5 (citing Paul Lewis, *Arabs at U.N. Relax Stand on P.L.O.*, N.Y. TIMES, Dec. 6, 1989, at A3), 7.

[12] *Id.* at 5 (citations omitted).

[13] *See id.* at 8–9 (citations omitted).

I. THAT PALESTINIAN OFFICIALS REPEATEDLY AND OPENLY ADMIT THAT PALESTINE IS NOT A "STATE" CONCLUSIVELY ESTABLISHES THAT PALESTINE DOES NOT MEET THE CONDITIONS REQUIRED TO ACCEDE TO ICC JURISDICTION.

A. Statements by PLO and PA Leaders Consistently Declare that Palestinian Statehood Remains a Future Event.

Of prime importance concerning whether Palestine is currently a "State" is the position consistently espoused by Palestine Liberation Organization (PLO) and PA officials themselves—something that Professor Quigley simply neglects to mention at all. As shown below, PLO and PA leaders repeatedly admit that Palestine is not currently a "State"—*a fact which by itself should put the issue to rest*. If Palestinian leaders themselves admit that no Palestinian State currently exists—a clear admission against PA interests—there is no reason to reject their position and ponder the issue further.

Professor Quigley places great importance on the 1988 Palestinian declaration of statehood, which he claims has led to broad recognition of Palestinian statehood by the world community.[14] Yet, he ignores repeated statements made by Palestinian leaders *since 1988* (i.e., *after* the 1988 declaration) about Palestinian statehood. Even PLO Chairman Yasser Arafat, during his tenure in office *after* the 1988 declaration of statehood (which Mr. Arafat helped champion), publicly recognized that Palestinian statehood remained a *future* goal. At the Arab Summit in Beirut in March 2002, for example, Mr. Arafat said the following:

> We are all confident in the inevitability of victory, as well as in the inevitability of achieving our national and Pan-Arab goals . . . including the right of return, the right to self-determination and the *establishment of the independent state of Palestine*, with holy Jerusalem as its capital . . . .
>
> . . . .
>
> Beloved brothers, I would like to tell you in frank and precise terms that we want our national, firm and inalienable rights, the rights that are supported by international legality, the rights of our refugees, our right to self-determination and to the *establishment of our independent state*, on the whole territory which was occupied in 1967, with holy Jerusalem as its capital.[15]

Moreover, the position currently espoused by PA President Mahmoud Abbas that Palestinians are *looking forward* to achieving statehood is consistent with a long line of speeches made by Mr. Abbas and others. For example, Mr. Abbas said the following in his inaugural speech as PA

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[14] *See Id.* at 4–5 (citations omitted).

[15] Yasser Arafat, Palestine Liberation Org. (PLO), Address at the Arab summit in Beirut (Mar. 27, 2002) (emphasis added), *available at* http://www.al-bab.com/arab/docs/league/arafat02.htm. Note that Mr. Arafat did not speak as if Palestine were already an independent state, despite the Palestine National Council's 1988 publicly announced Declaration of Independence for Palestine—a declaration made while the PLO was in exile in Tunisia. *See* Yasser Arafat, PLO, Speech at UN General Assembly (Dec. 13, 1988), *available at* http://mondediplo.com/focus/mideast/arafat88-en. Hence, even Mr. Arafat discounted the importance and effect of the 1988 declaration.

President in 2005: "The greatest challenge before us, and the fundamental task facing us[,] is national liberation. The task of ending the occupation [and] *establishing the Palestinian state* . . . ."[16]

In February 2005, shortly after his inauguration as PA President, Mr. Abbas said the following at an Egyptian summit meeting in Sharm el-Sheikh:

> [J]ust less than one month ago the Palestinian people went to the ballot boxes for the presidential elections, which were held after the departure of President Yasser Arafat. In this remarkable democratic practice, the Palestinian people embodied through this election[] their [decision for a] just peace that will put an[] end to dictates of war, violence and occupation. *Peace that means the establishment of a Palestinian state*, or the state of -- the democratic state of independent Palestine along[side] the State of Israel, as mentioned in the road map plan.[17]

Further, on November 24, 2008, President Abbas addressed the General Assembly of the United Nations in observance of the International Day of Solidarity with the Palestinian People.[18] In that speech, Mr. Abbas clearly confirmed the *aspirational* nature of the current drive for an independent Palestinian state:

> We highly appreciate your significant role in supporting our efforts to enable our people to realize their goals. We are certain that your role contributes in [a] clear and effective way in enhancing international solidarity with our just cause and enlarges the circle of international support for the aspirations of our people for *freedom and independence and the establishment of their State* . . . .[19]

Continuing his UN speech, Mr. Abbas referred to Jerusalem as "the capital *of our future independent State*."[20]

Regarding the January 2009 PA Declaration to the ICC, because Article 12(3) of the ICC Statute requires that a "State" lodge such a declaration, it would have been in the PA's interest to explicitly claim statehood if PA officials believed Palestine to be a state; yet, Palestinian officials failed to do so. Moreover, on February 4, 2009 (i.e., *after* the January 22, 2009, lodging of the PA Declaration with the ICC Registrar), PA President Abbas, in a speech before the European Parliament concerning the then-recently concluded Israeli military operation in the Gaza Strip, accused Israel of "preventing [the Palestinian] people from attaining their *ultimate goal*: an end to

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[16] Mahmoud Abbas, President, Palestinian Nat'l Auth., Inauguration Speech (Jan. 15, 2005) (emphasis added), *available at* http://electronicintifada.net/bytopic/historicalspeeches/338.shtml.

[17] Mahmoud Abbas, President, Palestinian Nat'l Auth., Speech at Egypt Summit (Feb. 8, 2005) (emphasis added), *available at* http://edition.cnn.com/2005/WORLD/meast/02/08/transcript.abbas.

[18] Mahmoud Abbas, President, Palestinian Nat'l Auth., Speech on the Occasion of the International Day of Solidarity with the Palestinian People (Nov. 24, 2008) (emphasis added), *available at* http://www.un.int/palestine/AbbasSolidarity08.shtml.

[19] *Id.* Admittedly, in his UN address, President Abbas does refer to 1988, when the Palestine National Council issued a Declaration of Independence while in exile in Tunisia. *Id.* Nevertheless, when taken in context with his repeated statements concerning a *future* independent state made in that same speech, it is apparent that even current Palestinian officials do not take the 1988 declaration seriously.

[20] *Id.* (emphasis added).

occupation, gaining freedom and the right to self-determination and the *establishment of an independent Palestinian state . . . .*"[21]

One day later, on February 5, 2009, President Abbas appeared with British Prime Minister Gordon Brown at a press conference at Number 10 Downing Street in London. In answering one of the questions put to him, President Abbas emphasized the need for international support for "the Arab peace initiative which calls for *the two state solution*."[22] Prime Minister Brown stated in support: "I believe the Arab peace initiative does point the way forward. I believe that the general terms of an agreement are well known to everyone: an Israel that is secure within its own borders, [and] *a Palestinian state that is viable . . . .*"[23] Taken together, President Abbas's and Prime Minister Brown's statements refute any notion that an independent Palestinian state currently exists (or existed when the PA Declaration was lodged with the ICC Registrar in January 2009). Yet, there is more.

On June 22, 2009, Palestinian Prime Minister Salam Fayyad "called for the *establishment of a Palestinian state within two years*."[24] In the same speech, he called on all Palestinians to "help create the institutions that will 'embody' *the future state*."[25]

One final example should suffice to demonstrate that President Abbas (representing the PA in general) has no illusions that a state of Palestine currently exists. At the August 2009 Fatah conference in Bethlehem, Mr. Abbas continued to express his vision and hope for a *future* Palestinian state: "Our people are committed to the peace option . . . and to reach its objectives of freedom, independence and the *creation of a Palestinian state*."[26] Further, "[President Abbas] insisted that he still believed in the peace talks which began in the early 1990s, *even though they have failed to create a Palestinian state*."[27]

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[21] Press Release, Mahmoud Abbas, President, Palestinian Nat'l Auth., Mahmoud Abbas at the European Parliament (Feb. 4, 2009) (emphasis added), *available at* http://www.europarl.europa.eu/news/expert/ infopress_page/030-4816 5-033-02-06-903-20090203IPR48164 -02-02 -2009-2009-true/default_en.htm.

[22] Mahmoud Abbas, Press Conference with British Prime Minister Gordon Brown and Palestinian National Authority President Mahmoud Abbas (Feb. 5, 2009) (emphasis added), *available at* http://www.number10.gov.uk/Page18253.

[23] *Id.* (emphasis added).

[24] Howard Schneider, *Palestinian Premier Sets 2-Year Statehood Target*, WASH. POST, June 23, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/06/22/AR2009062202962.html (emphasis added). It is obvious that one does not call for establishing a state "within two years" (or any other time limit) when such a state already exists.

[25] *Id.* (emphasis added).

[26] *See* AGI News On *Mideast: Abu Mazen, Resisting Israel Is a Right* (emphasis added), *available at* http://www.agi.it/world/news/200908131547-pol-ren0034-mideast_abu_mazen_resisting_israel_is_a_right. Abu Mazen is an alias of Mahmoud Abbas. *See* Biography of Abu Mazen, *available at http*://www.answers.com/topic/abu-mazen. In the portion of the quotation replaced by the ellipsis, Mr. Abbas discussed using resistance to achieve Palestinian independence. Since that was a possible *means* to the end sought, it did not refute the fact that Palestinian statehood has not yet been achieved.

[27] Rory McCarthy, *Fatah Holds First Party Conference for 20 Years*, GUARDIAN.CO.UK, Aug. 4, 2009, http://www.guardian.co.uk/world/2009/aug/04/fatah-conference-abbas-west-bank (emphasis added). In a letter addressed to the same conference, Saudi King Abdullah likewise acknowledged the absence of a Palestinian state: "I can honestly tell you, brothers, that even if the whole world joins to found a Palestinian independent state, and if we have full support for that, this state would not be established as long as the Palestinians are divided." Khaled Abu Toameh, *'Palestinian Rift Worse Than Israel'*, JERUSALEM POST, Aug. 5, 2009, http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull&cid=1249418529052. Such a statement clearly shows that the Saudi king (a prominent figure in the greater Arab community) also acknowledges that Palestine is not a State.

As shown above, even after the 1988 declaration of statehood, Palestinian leaders have consistently expressed—and continue to express—the view that no Palestinian state has yet come into existence. Such evidence conclusively refutes Professor Quigley's contrary conclusion. It also lessens the actual significance of the 1988 declaration to both the Palestinians and the international community.

B. Information on the Official Website of the PLO Negotiations Affairs Department Also States that Palestinian Statehood Remains a Future Event.

In addition to the many public admissions by Palestinian leaders that no Palestinian state currently exists, there are a number of similar admissions on the official website of the PLO Negotiations Affairs Department,[28] confirming that Palestinian statehood remains a future prospect as well. For example, The PLO Negotiations Affairs Department has published a "Negotiations Primer" that describes the purpose of Palestinian negotiations as a means "to realize Palestinian national rights of self-determination *and statehood*"[29] as well as to achieve "the end of Israeli occupation and the *establishment of a sovereign and independent Palestinian state*."[30]

In its introduction to the section on Frequently Asked Questions (FAQ), the PLO Negotiations Affairs Department wrote the following:

> The 15th of November 2008 marks the twentieth anniversary of the Palestinian Declaration of Independence. The Declaration was made at the 19th Session of the Palestinian National Council (PNC), the highest Palestinian legislative authority, and provided the first official Palestinian endorsement of a two-state solution to the Israeli-Palestinian conflict.
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> *Twenty years later, Palestinians are still waiting for Israel to respond in kind* to this historic compromise by ending its 41-year old occupation of Palestinian territory and *supporting the establishment of an independent, viable, sovereign Palestinian state* living side-by-side with Israel in peace and security.[31]

These are unequivocal admissions that Palestine is not yet a State. Moreover, Question 5 of the FAQ asks: "Why have the Palestinians *failed to attain statehood*, twenty years after their Declaration of Independence?"[32] The answer provided to that question, though laying sole blame on Israel, openly admits that all efforts to attain statehood in the intervening period failed.[33] If the Palestinians admit this, surely Professor Quigley should do so as well.

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[28] *See* PLO Negotiations Affairs Department, http://www.nad-plo.org/ (last visited Oct. 23, 2009).
[29] PLO NEGOTIATIONS AFFAIRS DEP'T, NEGOTIATIONS PRIMER 4 (2009) (emphasis added), *available at* http://www.nad-plo.org/news-updates/magazine.pdf.
[30] *Id.* at 12 (emphasis added).
[31] PLO NEGOTIATIONS AFFAIRS DEP'T, THE HISTORIC COMPROMISE: THE PALESTINIAN DECLARATION OF INDEPENDENCE AND THE TWENTY-YEAR STRUGGLE FOR A TWO-STATE SOLUTION 1 (2008) (emphasis added), *available at* http://www.nad-plo.org/news-updates/Historic%20Compromise%20FAQs%20FINAL.pdf.
[32] *Id.* at 3 (emphasis added).
[33] *Id.*

C. PLO/PA Participation in the Ongoing Peace Process, One of Whose Goals is the Establishment of a Palestinian State, Provides Further Proof That No Palestinian "State" Currently Exists.

Since the early 1990s, Palestinians have been engaged in a peace process with Israelis in an effort to resolve the ongoing conflict between them and to establish a viable Palestinian State neighboring the State of Israel. This process was agreed to by Israel and the PLO and involves a series of arrangements which established the Palestinian Authority (PA)[34] and which defined the legal situation between the parties until such time as a final settlement is concluded. The International Court of Justice (ICJ) described the situation between Israel and the PLO as follows:

> [A] number of agreements have been signed since 1993 between Israel and the Palestine Liberation Organi[z]ation imposing various obligations on each party. Those agreements *inter alia* required Israel to transfer to Palestinian authorities certain powers and responsibilities exercised in the Occupied Palestinian Territory by its military authorities and civil administration. Such transfers have taken place, but, as a result of subsequent events, they remained partial and limited.[35]

The terms of the 1995 Interim Agreement, to which the Palestinian authorities have agreed to be bound, explicitly withhold from the PA authority to engage in foreign relations (specifically limiting the PA ability to establish embassies or other types of diplomatic missions abroad or to permit their establishment in the West Bank or Gaza Strip, as well as limiting the exercise of other diplomatic functions that normally attend statehood).[36] Foreign relations responsibilities are to be retained by Israel under the Interim Agreement. That is significant, because the ability to enter into relations with foreign states is one of the four criteria generally recognized as being indispensable to statehood.[37]

> Israel also retained control over external defense of the West Bank and Gaza Strip:
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> Israel shall continue to carry responsibility for defen[s]e against external threats, including the responsibility for protecting the Egyptian and Jordanian borders, and for defen[s]e against external threats from the sea and from the air, as well as the responsibility for overall security of Israelis and settlements, for the purpose of

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[34] Note that the PA was *not* created by Palestinians acting independently; rather, the PA was established by virtue of a series of Israeli-Palestinian agreements (the Oslo Peace Process) as an initial step to an eventual two-state solution. Palestine Facts, Israel 1991 to Present: PA Origins, What is the Palestinian Authority and How Did it Originate?, http://www.palestinefacts.org/pf_1991to_now_pa_origin.php (last visited Oct. 23, 2009).

[35] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 167 (July 9). Among the agreements signed between the two parties are the following: Declaration of Principles on Interim Self-Government Arrangements, Isr.-PLO, Sept. 13, 1993, 32 I.L.M. 1525; Agreement on the Gaza Strip and Jericho Area ("Cairo Agreement"), Isr.-PLO, May 4, 1994, 33 I.L.M. 622; Interim Agreement on the West Bank and Gaza Strip, Isr.-PLO, Sept. 28, 1995, 36 I.L.M. 551 [hereinafter "Interim Agreement"].

[36] Interim Agreement, *supra* note 35, art. 9(5). The Palestinians were permitted, however, to interact internationally with respect to "economic agreements," "agreements with donor countries," "cultural, scientific and educational agreements," and the like. *Id.* art 9(5)(a)–(b).

[37] Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097 [hereinafter "Montevideo Convention"], *available at* http://avalon.yale.edu/20th_century/intam03.asp. Article 1 of the Montevideo Convention established four prerequisites to statehood: a permanent population; a defined territory; a government; and a capacity to enter relations with other States. *Id.*

> safeguarding their internal security and public order, and will have all the powers to take steps necessary to meet this responsibility.[38]

Israel's retention of these responsibilities is also significant in that it indicates that the PA was not able to freely govern any territory in the West Bank or Gaza Strip without the express warrant of Israel. Moreover, even when the PA began to exercise a modicum of governmental authority, that authority did not include external security, control of airspace, or control of Israeli civilians and settlements. This fact is crucial because the ability to govern one's territory is also an indispensable requirement to establish statehood.[39]

Finally, the terms of the Interim Agreement prohibit both Israel and the PA from "initiat[ing] or tak[ing] any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent negotiations."[40] Such negotiations promise to be the most difficult, since they include highly contentious issues such as "Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbours [sic] . . . ."[41]

Even the brief recitation above demonstrates that Palestinian officials agreed to abide by measures during the ongoing peace process that clearly left in Israeli hands sovereign responsibilities that normally would inhere in an independent state. Such agreement further demonstrates that no sovereign Palestinian "State" currently exists and that Palestine does not exercise "sovereign" authority over any territory in the West Bank or the Gaza Strip.

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In sum, there can be no doubt that there is no "State" of Palestine in existence at this particular point in history, as even Palestinian officials readily admit. If the Palestinians themselves recognize that no state of Palestine currently exists, as indicated by their repeated public admissions and their ongoing participation in negotiations aimed at creating just such a state, then surely Professor Quigley's conclusions to the contrary must be incorrect.

II. THAT PALESTINE IS NOT RECOGNIZED AS A "STATE" BY KEY INTERNATIONAL INSTITUTIONS IS ADDITIONAL INDICATION THAT THE INTERNATIONAL COMMUNITY DOES NOT RECOGNIZE PALESTINE AS A "STATE."

Professor Quigley noted that "[t]he attitude of other states is a key ingredient in regard to statehood."[42] He concluded that "[i]f an entity is accepted as a state, then it is a state."[43] This begs the question: Accepted as a state *by whom*? Surely, Professor Quigley's assertion is subject to some limitations. For example, Turkey "accepts" the Turkish Republic of Northern Cyprus as a "State." Does that make it one? Professor Quigley (correctly, in my view) argues "no" in that case.[44] So, mere "accept[ance] as a state" cannot be the sole standard. In fact, recognition or non-recognition of an entity as a "State" is a sovereign political decision made by individual states that is not always

[38] Interim Agreement, *supra* note 35, art. 12.
[39] Montevideo Convention, *supra* note 37, art. 1.
[40] Interim Agreement, *supra* note 35, art. 31(7).
[41] *Id.* arts. 17(1)(a), 31(5).
[42] Quigley, *supra* note 7, at 7.
[43] *Id.*
[44] *Id.* at 4.

(at least, on the surface) rational—*or conclusive* (as Professor Quigley's example regarding Northern Cyprus attests). Actions by international bodies often suffer from the same or similar defects. Consider, for example, how important international bodies treat "Palestine" *in practice* (despite multiple recognitions of Palestinian statehood by individual member states of those same international bodies[45]).

A. In the United Nations, Palestine is Credentialed, Not as a "State," But as an "Entit[y] having received a standing invitation to participate as observer in the sessions and the work of the General Assembly and maintaining permanent observer mission at Headquarters."[46]

As noted earlier, Professor Quigley placed great significance on the Palestine National Council's (PNC) 1988 declaration of statehood.[47] He noted that PLO Chairman Yasser Arafat was invited to address the UN General Assembly as a direct result of that declaration.[48] He further noted that the General Assembly—by an overwhelming vote—decided to adopt the designation, "Palestine," to replace the prior designation, "Palestine Liberation Organization," in the UN system.[49] Professor Quigley then concluded from such a strong showing of General Assembly support "that Palestine was regarded as a *state*."[50] In support of his argument, he also cited the fact that both the former Belgian Congo and Guinea-Bissau were accepted as UN member states *before* their respective colonial powers relinquished actual control over their territories.[51] Yet, how Palestinian officials have been (and are currently) treated at the UN strongly suggests that Professor Quigley's assertions vis-à-vis the UN and Palestine are, at best, questionable and, in fact, wrong.

Although it is true that Palestinian officials actively participate in activities at the UN in New York and elsewhere, Palestine nonetheless enjoys only observer status. It is not a member of the UN General Assembly, and, hence, its representatives are not permitted to vote. Only *States* may become UN members.[52] And, unlike the Holy See, which, though not a UN member, is an internationally-recognized State, Palestine is not included or seated in the category "[n]on-member *State* having received a standing invitation to participate as observer in the sessions and the work of the General Assembly and maintaining permanent observer mission at Headquarters."[53] Instead, Palestine is listed under "*[e]ntities* having received a standing invitation to participate as observers in the sessions and the work of the General Assembly and maintaining permanent observer mission at

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[45] *Id.* at 5 (citing Lewis, *supra* note 11).
[46] Executive Office of the Sec'y-General, Protocol & Liaison Serv., *Publication of Permanent Missions to the United Nations*, at 311, U.N. Doc. ST/SG/SER.A/299 (Mar. 2009) (emphasis added), *available at* http://www.un.int/protocol/bluebook/bb299.pdf.
[47] *Supra* note 14 and accompanying text.
[48] Quigley, *supra* note 7, at 4 (citing Robert Pear, *U.S. Won't Oppose U.N. Geneva Session*, N.Y. TIMES, Nov. 29, 1988, at A3).
[49] *Id.* (citations omitted).
[50] *Id.* (emphasis added). *But see* JAMES R. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 437 (2d ed. 2006) ("Applying the Montevideo Convention in accordance with its terms, *Palestine before 1993 could not possibly have constituted a State.* Its whole territory was occupied by Israel which functioned as a government there and claimed the right to do so until further agreement. The PLO had never functioned as a government there and lacked the means to do so, given strong Israeli opposition." (emphasis added)).
[51] Quigley, *supra* note 7, at 6–7 (citations omitted).
[52] U.N. Charter art. 4, para. 1 (noting that membership is available to "peace-loving *states*" (emphasis added)).
[53] *Publication of Permanent Missions to the United Nations*, *supra* note 46, at 310.

Headquarters."[54] Palestine has been listed as an "entity" with observer status (not as a "non-member *state*" with observer status) since 1988.[55] Such a long-standing practice seriously undermines Professor Quigley's contention that Palestine "was regarded as a state"[56] by the General Assembly.

B. At the 1998 Rome Conference and at Subsequent Meetings Concerning the International Criminal Court and Its Implementation, Palestine Has Not Been Listed as a Participating "State."

Palestine was also not credentialed as a participating "State" at the Rome Conference in 1998 that resulted in the creation of the ICC. The official roster of "Participating States" at the Conference included the names of 163 States; it did not include the PA or Palestine as a "State." Rather, Palestine was placed under the category of "Other Organizations" in the diplomatic roster of the Conference.[57] Moreover, the two Palestinian delegates accredited to the Conference, Mr. Nimer Hammad, the PA General Delegate to Italy, and Mr. Marwan Jilani, the Counselor of the Permanent Observer Mission of Palestine to the United Nations, were listed as representing an "Organization[]," *not* a "State."[58] In subsequent meetings of the ICC Preparatory Commission, Palestine was present in the category of "Entities, intergovernmental organizations and other bodies having received a standing invitation to participate as *observers* in the sessions and the work of the General Assembly,"[59] once again, not as a "State."

The ICC has consistently treated (and continues to treat) Palestine as an organization and not as a "State." A prominent example of this took place in February 2009, at the ICC States Parties meeting in New York City, where Palestine was grouped with "Entities, intergovernmental organizations, and other entities."[60] Given its consistent treatment by the ICC as a non-state entity, it is somewhat ironic that Palestine sought to accede to ICC jurisdiction via Article 12(3) without some explicit claim of statehood, since an action brought under Article 12(3) is limited to "States."[61]

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[54] *Id.* at 311 (emphasis added).
[55] As noted above, Professor Quigley was correct in stating that the UN adopted "Palestine" to replace the prior designation "Palestine Liberation Organization" in 1988. "Palestine" has thus enjoyed observer status since that time. However, the *PLO* began enjoying observer status in 1974. Observer Status for the Palestine Liberation Organization, G.A. Res. 3237 (XXIX), U.N. Doc A/RES/3237 (Nov. 22, 1974). The important thing to note is that, throughout its history, the PLO and "Palestine" have never been regarded as anything but "entities" by the UN.
[56] Quigley, *supra* note 7, at 4. At best, Palestine can be considered an "incipient" or "emerging" state—not a full-fledged state—whose ultimate statehood depends on the outcome of the ongoing Israeli-Palestinian peace process, one of the goals of which is the eventual establishment of a Palestinian state.
[57] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15 to July 17, 1998, *Official Records*, at 5, 44, U.N. Doc. A/CONF.183/13 (vol. II) (2002), *available at* http://untreaty.un.org/cod/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf.
[58] *Id.* at 44.
[59] United Nations Preparatory Commission for the International Criminal Court, New York, Apr. 8–19, 2002, *List of Delegations*, at 10, U.N. Doc. PCNICC/2002/INF/6 (Apr. 30, 2002) (emphasis added), *available at* http://daccessdds.un.org/doc/UNDOC/GEN/N02/401/72/IMG/N0240172.pdf?OpenElement.
[60] International Criminal Court, Assembly of States Parties, New York, Feb. 9–13, 2009, *Delegations to the Second Resumption of the Seventh Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court*, at 50, U.N. Doc. ICC-ASP/7/INF.1/Add.2 (Mar. 26, 2009), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/ICC-ASP-7-INF.1-Add.2.pdf.
[61] Rome Statute art. 12(3).

C. In Its 2004 Advisory Opinion Regarding the Security Barrier Being Built by Israel in Portions of the West Bank, the International Court of Justice Advisory Opinion Was Predicated on the Court's Conclusion that Palestine Was Not a "State."

Not only does the UN General Assembly not officially recognize Palestine as a state, but the International Court of Justice (ICJ) has also concluded that Palestine has not yet attained statehood. The ICJ, in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories (Advisory Opinion)*,[62] confirmed that the Palestinian territories have not achieved statehood. The Court held that Israel could not justify the building of its security barrier by invoking the right to self-defense under Article 51 of the UN Charter.[63] The specific reason for the ICJ holding was that Israel claimed the barrier was necessary to defend against Palestinian attacks. The ICJ rejected the Israeli rationale because Israel "d[id] not claim that the attacks against it [we]re imputable to a foreign *State*."[64] The Court opined that because Article 51 only recognizes "the existence of an inherent right of self-defense in the case of an armed attack by one State against another State," the right did not apply to attacks launched at Israel from Palestinian territory.[65]

This conclusion was buttressed by Judge Elaraby (whose separate opinion in the *Legal Consequences* case articulated Palestinian rights at their highest). Judge Elaraby gave a history of Palestine and concluded that no sovereign Palestinian state existed: "On 14 May 1948, the independence of the Jewish State was declared. The Israeli declaration was 'by virtue of [Israel's] natural and historic right' and based 'on the strength of the resolution of the United Nations General Assembly.' *The independence of the Palestinian Arab State has not yet materialized*."[66]

D. The Government of Switzerland, as Custodian of the Geneva Conventions, Concluded that It Could Not Accept Palestinian Accession to the 1949 Geneva Conventions Because Palestine Could Not Be Determined to Be a "Power" (i.e., a "State") Permitted to Accede to the Conventions.

Professor Quigley also mentioned the June 1989 Palestinian attempt to accede to the 1949 Geneva Conventions as evidence of Palestinian statehood.[67] He correctly noted that the validity of the Palestinian attempt "depended on Palestine being a state, since ratification of these four treaties is open only to 'powers.'"[68] The Swiss Government declined to accept the Palestinian attempt

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[62] 2004 I.C.J. 136. This opinion is quite controversial and has been extensively criticized. Nevertheless, it is noteworthy for confirming that no Palestinian state existed in 2004, despite the 1988 declaration of statehood by the Palestinian National Council.

[63] *Id.* at 194.

[64] *Id.* (emphasis added).

[65] *Id.*

[66] *Id.* at 251 (Elaraby, N., separate opinion) (citations omitted) (emphasis added). Judge Elaraby's concurrence is especially significant for noting that no Palestinian state has existed since 1948, when the British Mandate ended and British troops departed Palestine. That conclusion also contradicts Professor Quigley's assertions about the importance and impact of the 1988 declaration of statehood. *See* Quigley, *supra* note 7, at 4–5.

[67] *See* Quigley, *supra* note 7, at 3.

[68] *Id.* (quoting Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 60, Aug. 12, 1949, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 59, Aug. 12, 1949, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War art. 139, Aug. 12, 1949, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War art. 155, Aug. 12, 1949, 75 U.N.T.S. 287).

because it could not determine whether Palestine was a state, a prerequisite to being able to accede to the 1949 Conventions.[69] From this, Professor Quigley concluded that "Switzerland took no position on Palestinian statehood."[70] Professor Quigley's final observation about the Swiss action was that "Switzerland did not regard it as proper, as a single state, to make a determination that would have implications for the international community."[71] The observation concerning the Swiss action *in 1989* seems to contradict Professor Quigley's assertion that the *1988* UN General Assembly vote was a strong indication "that Palestine was regarded as a state"[72] as well as his assertion that "[i]f an entity is accepted as a state, then it is a state."[73]

By declining to affirm Palestine's right to accede to the Conventions, Switzerland did, in fact, take a position on Palestinian statehood—*albeit indirectly*. The Swiss Government determined that Palestinian statehood was not a settled issue in the international community.[74] On that basis, the Swiss Government concluded that it was incapable of recognizing Palestine as a "power" that could accede to the Conventions. Yet, if Palestine was not a power that could accede to the conventions, it had to be something less than a "State," since States could accede to the Conventions. The Swiss conclusion comports fully with the UN's consistent designation of Palestine—as a recognizable political entity, but not a "State."[75]

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As indicated above, key international bodies have consistently recognized—and continue to recognize—Palestine as a political entity that has yet to attain statehood. The determinations by these international bodies comport fully with what Palestinian officials themselves readily and repeatedly concede: Palestine is not currently a "State."

III. THAT NO ARAB PALESTINIAN STATE CURRENTLY EXERCISES SOVEREIGN CONTROL OVER CLAIMED PALESTINIAN "TERRITORY" ALSO CONFIRMS THAT PALESTINE IS NOT A "STATE."

Professor Quigley correctly pointed out that "only a state that is *sovereign in a particular territory*" can accede to ICC jurisdiction.[76] Hence, Professor Quigley had to find a way to argue that "Palestine" is, in fact, sovereign over particular territory.[77] He bases his argument of Palestinian sovereignty over the West Bank and the Gaza Strip (to wit, "Palestinian territory") on the fact that the British, during the Mandate, were merely holding Palestinian sovereignty in trust for the Palestinian people. Thus, when the British departed, sovereignty over Palestine reverted to the Palestinian people.[78] Yet, Professor Quigley's analysis fails to explain a number of key issues. First,

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[69] Quigley, *supra* note 7, at 3–4 (quoting *Note of Information*, Government of Switzerland, Berne, Sept. 13, 1989).
[70] *Id.* at 4.
[71] *Id.*
[72] *Id.*
[73] *Id.* at 7.
[74] *Supra* note 69 and accompanying text.
[75] *E.g.*, *supra* notes 46-56 and accompanying text.
[76] Quigley, *supra* note 7, at 3 (emphasis added); *see also* CRAWFORD, *supra* note 50, at 62 ("Independence is the central criterion for statehood.").
[77] Professor Quigley fails to mention the fact that the PA has acceded to the terms set forth in the various arrangements which form the centerpiece of the ongoing peace process; terms by which Israel retains the key indicia of sovereignty over the West Bank and the Gaza Strip. *See supra* Part I.C.
[78] Quigley, *supra* note 7, at 8–9.

the "Palestinian people" to whom sovereignty reverted upon the departure of the British would have included both Jews and Arabs.[79] So, under Professor Quigley's reversion theory, sovereignty over Palestine reverted to both its Jewish and Arab inhabitants (thereby establishing a colorable *Jewish*—as well as Arab—claim to all of Palestine, including the West Bank and Gaza Strip,[80] and tending to refute Professor Quigley's contention that there are no other claimants to that territory[81]).

Second, the UN partition plan had designated specified territory within Palestine for an Arab state, but the Arabs rejected that plan—and, concomitantly, control over such territories. That rejection strongly suggests that Arab Palestinians rejected the UN grant of sovereignty over those portions of land designated for the Arab state.[82] Yet, whatever one concludes in that regard, one thing is clear—following that rejection, the Palestinian Arabs have never had the opportunity to exercise full sovereign control over any Palestinian territory.[83]

Third, once the 1948-1949 Arab-Israeli war was concluded, Arab states in control of Palestinian territory at the time of signing the various armistice agreements with Israel declined to relinquish to Palestinian Arab authorities control over Palestinian territory remaining in Arab hands.[84] Thus, it was not Israel that kept Arab Palestinians from establishing a state in either 1948 or 1949; it was the neighboring Arab states. The Gaza Strip remained under Egyptian occupation, and the West Bank remained occupied by Jordanian forces. In fact, Jordan even went so far as to

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[79] *E.g.*, Mandate for Palestine art. 7, League of Nations Doc. C.529M.314 1922 VI (1922), *available at* http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/The+Mandate+for+Palestine.htm.

[80] If one were to argue that the Palestinian Jews' acceptance of the partition plan constituted the waiving of any future legal claim of sovereignty over any remaining portions of Palestine, it would logically follow that the Palestinian Arabs' rejection of sovereignty over the portions allocated to them by the plan would likewise have a legal effect on their sovereign rights over such territory.

[81] Quigley, *supra* note 7, at 5 ("The normal requirement of effective control over territory is applied less strictly if no competing entity claims title. With Gaza and the West bank, there were no competing claimants." (citing CRAWFORD, *supra* note 50, at 59)). Professor Quigley's assertion that there were no competing claimants is simply incorrect. Recall that Israel (the Jewish *Palestinian successor state* to the British Mandate) claims the City of Jerusalem (including East Jerusalem, which is part of the West Bank) as its historic capital, *see* ROGER FRIEDLAND & RICHARD HECHT, TO RULE JERUSALEM 8 (2000), and that UN Security Council Resolution 242 foresees that final territorial questions (including the issue of establishing defensible boundaries) will be resolved as part of the final negotiations to resolve the Israeli-Palestinian conflict, including acquisitions of land by Israel on the West Bank. *See* Eugene Rostow, Correspondence, 84 AM. J. INT'L L. 717, 718 (1990) (responding to Professor Adam Roberts's article *Prolonged Military Operations: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44 (1990)) ("The right of the Jewish people to settle in Palestine has never been terminated for the West Bank."). *See generally* Meir Rosenne, *Understanding UN Security Council Resolution 242 of November 22, 1967, on the Middle East*, *in* DEFENSIBLE BORDERS FOR A LASTING PEACE 45 (Jerusalem Ctr. for Pub. Affairs ed., 2008), http://www.defensibleborders.org/db_rosenneb.pdf. Further, there have been - and continue to be - segments of Israeli society that continue to view "Judea and Samaria" as areas promised to the Jews by the Balfour Declaration (which was, in turn, made part of the World War I peace treaties as well as part of the British Mandate). *See, e.g.*, Moshe Arens, *A Matter We Must Solve Ourselves*, HAARETZ, July 29, 2009, http://www.haaretz.com/hasen/spages/1103397.html ("[A] reading of that convention and an acquaintance with the history of Palestine since the Balfour Declaration and the League of Nations Mandate for Palestine, as well as with the circumstances of the occupation of Judea and Samaria by the Jordanian army in the years between 1948 and 1967, make it clear that that Geneva Convention is not applicable to Israel's presence in these territories.").

[82] *See supra* note 80.

[83] Even noted Palestinian supporter, Professor Avi Shlaim, admitted as much. Don Attapatu, *Interview With Middle East Scholar Avi Shlaim: America, Israel and the Middle East*, THE NATION, June 16, 2004, http://www.thenation.com/doc/20040628/attapatu ("[T]he Palestinians have never exercised sovereignty over the land in which they lived . . . ."). For further support, see supra notes 34–35 and 38–39, and accompanying text.

[84] YEZID SAYIGH, ARMED STRUGGLE AND THE SEARCH FOR STATE: THE PALESTINIAN NATIONAL MOVEMENT, 1949–1993 35 (1999), *available at* http://www.questia.com/PM.qst?a=o&d=10156112.

claim Jordanian sovereignty over the entire West Bank.[85] Hence, even if the Arab Palestinians did not reject sovereignty (which their rejection of the lands allotted to Palestinian Arabs by the UN partition plan certainly suggests), they were nonetheless precluded by their putative Arab allies from exercising sovereignty over any portion of Palestine from 1948 to the 1967 Arab-Israeli War.

Fourth, as a result of the 1967 Arab-Israeli War, both the West Bank and the Gaza Strip came under Israeli control, once again *without any intervening period of Arab Palestinian rule whatsoever*. Hence, Israel never took over territory over which Palestinian Arabs had ever exercised sovereignty. Rather, Israel seized territory which had been under continuous military occupation by neighboring Arab states since the departure of the British in 1948. Because no independent (Arab or Jewish) *Palestinian state* had, prior to 1967, ever existed in the West Bank and Gaza Strip, the last people in whom sovereignty over those territories resided—consistent with Professor Quigley's reversion theory—included both Arab *and Jewish* Palestinians. As such, in 1967, Israel captured territory to which it has an arguable claim of sovereignty as the only existing, sovereign successor state to the British Mandate[86] (especially since the Arab Palestinians had explicitly rejected accepting sovereignty in 1947 or 1948). In that light, it is questionable whether Israel can legitimately be viewed as an occupying power.[87] That position was also made clear to the international community by the Israeli Government when Israel announced its intention to implement Fourth Geneva Convention humanitarian measures, *despite having no legal duty to do so*,[88] since a State cannot "occupy" territory (in the sense of the Fourth Geneva Convention) over which it has colorable "sovereign" claims and which had no legitimate prior sovereign.

Fifth, although Israel understands and agrees that an Arab Palestinian state must be established to fulfill the national aspirations of Arab Palestinians, the establishment of such an Arab state must result from mutual negotiations between the parties. To that end, both Israelis and

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[85] *Id.* at 16.

[86] *See, e.g.*, Avinoam Sharon, *Keeping Occupied: The Evolving Law of Occupation*, 1 REGENT J. L. & PUB. POL'Y 145, 155 (2009) (noting that "saying that the territories were occupied by Israel 'could conceivably be interpreted as a renunciation of sovereign rights by Israel to the areas [since] one does not "occupy" one's own territory'"). An additional Israeli concern is that saying that the territories were occupied by Israel "could be construed as acceptance of the 1949 ceasefire lines as international borders." *Id.* at 155. This latter point, once again, refutes Professor Quigley's assertion that there is no other claimant to "Palestinian territory," since Israel will doubtless seek to negotiate "defensible boundaries" (meaning boundary adjustments that will modify the 1949 ceasefire line in Israel's favor) pursuant to UN Security Council Resolution 242. *See also* Moshe Arens, *supra* note 80.

[87] For an interesting, in-depth discussion of this topic, see generally Sharon, *supra* note 86.

[88] Sharon, *supra* note 86, at 153–54. Sharon continues:

> Upon assumption of control of the territories, Israel had to make a decision as to the applicable law. There were several reasons for Israel not to wish to view the captured territories as occupied, and therefore subject to the provisions of the Fourth Geneva Convention. From a legal standpoint, Israel took the view that in the absence of a prior sovereign, Israel's control of the West Bank and Gaza did not fall within the definition of "occupation" inasmuch as a fundamental premise of the law of occupation—a prior legitimate sovereign—was lacking.
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> Israel's argument concerning de jure application of the law of occupation did not, however, deter it from declaring its intention to act in accordance with customary international law and the humanitarian provisions of the Fourth Geneva Convention . . . . This intention seems consistent with the view of [Yehuda Z.] Blum:
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> > The conclusion to be drawn from all this is that whenever, for one reason or another, there is no concurrence of a normal "legitimate sovereign" with that of a "belligerent occupant" of the territory, only that part of the law of occupation applies which is intended to safeguard the humanitarian rights of the population.

Id. (citations omitted).

Palestinians have freely entered into an ongoing process to resolve the outstanding issues between them, one of which is the eventual establishment of a viable, independent Palestinian state.[89] The fact that the Arab Palestinians have entered into such a process is proof positive that no current Palestinian "State" exists (because one does not negotiate to obtain what one already possesses).

And finally, given the current degree of Israeli military and economic control and influence over the West Bank and the Gaza Strip, it remains highly problematic to assert that an Arab Palestinian entity (like the PLO or PA) is "sovereign" over any Palestinian territory at all.[90] Hence, to date, since the departure of the British in 1948, there has been no Arab Palestinian control equivalent to sovereign control over any portion of Palestine. Even the Hamas-controlled Gaza Strip (where one might plausibly argue that Arab Palestinians exercise the most control over their own affairs) does not control its land borders, coastline, or airspace and remains dependent on Israel for electricity, fuel, and other basic necessities of life.[91]

CONCLUSION

In light of the foregoing, it is difficult to fathom how anyone could argue that there is a state of Palestine currently in existence. Even the Palestinian leaders themselves, through both their frequent statements and their voluntary participation in a process whose goal is to establish a Palestinian "State," testify that *what they hope to achieve in the future* is the creation of a viable Palestinian state. If creation of a viable Palestinian state is the goal Palestinian leaders continue to pursue, that is proof positive that no such "State" currently exists, despite Professor Quigley's contrary conclusion. Absent Palestinian statehood, the PA Declaration to the ICC is *ipso facto* invalid and incapable of conveying jurisdiction to the ICC over the West Bank and the Gaza Strip. As such, the Declaration must be rejected.

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[89] *Supra* Part I.C.

[90] A specific example that is included under the Interim Agreement should serve to illustrate this point. The West Bank is divided into three types of Areas, designated A, B, and C. Interim Agreement, *supra* note 35, arts. 3(1), 9(2). The degree of PA control varies in each area, with the most control in Areas A and the least control in Areas C. *See id.* Even in Areas A, where the PA exercises the most control, the PA still does not control individual Israelis in such areas, and it does not control the airspace or external security. *Id.* arts. 5(2)(a), 8(1)(a), 13(4). In Areas B, the PA controls public order and civilian affairs of Palestinian residents, but Israel retains control of Israelis and all airspace, security, and so on. *Id.* art. 5(3). In Areas C, Israel continues to exercise control over most governmental fields. *Id.* Taken together, Areas A and B constitute approximately 40% of the entire West Bank; Areas C constitute the remainder, which remains under virtually total Israeli control. The Gaza Strip is currently under total Hamas (not PA) control, and the Hamas leaders who govern Gaza openly oppose the PA and its authority. Steven Erlanger, *Hamas Seizes Broad Control in Gaza Strip*, N.Y. TIMES, June 14, 2007, at A1, *available at* http://www.nytimes.com/2007/06/14/world/middleeast/14mideast.html; *see also Hamas Says Gaza Now Under Control*, BBC NEWS, Aug. 15, 2009, http://news.bbc.co.uk/2/hi/middle_east/8203713.stm (detailing Hamas's restoration of order following an insurrection in southern Gaza).

[91] *See* Steven Erlanger, *An Egyptian Border Town's Commerce, Conducted Via Tunnels, Comes to a Halt*, N.Y. TIMES, Jan. 1, 2009, at A12; *see also* Human Rights Watch, Q&A on Hostilities Between Israel and Hamas, What International Humanitarian Law Applies to the Current Conflict Between Israel and Hamas?, http://www.hrw.org/en/news/2008/12/31/q-hostilities-between-israel-and-hamas#_What_international_humanitarian.